STATE OF MICHIGAN

IN THE SUPREME COURT

MAYOR OF THE CITY OF LANSING,
CITY OF LANSING & INGHAM COUNTY
COMMISSIONER LISA DEDDEN,

Appellees/Cross-Appellants,

-vs-

MICHIGAN PUBLIC SERVICE COMMISSION
& WOLVERINE PIPE LINE COMPANY,

Appellants/Cross-Appellees.
_____/

Supreme Court No. 124136

Court of Appeals No. 243182

MPSC Case No. U-13225

MAYOR OF THE CITY OF LANSING AND CITY OF LANSING APPELLEES & CROSS-APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX TO AUTHORITIES

Page

MICHIGAN CASES

FEDERAL CASES

OUT-OF-STATE CASES

COURT RULES

STATUTES

CONSTITUTIONAL PROVISIONS

LEGAL TREATISES AND TEXTS

ADMINISTRATIVE RULES

MISCELLANEOUS

PUBLIC ACTS

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

On June 5, 2003, the Court of Appeals issued an opinion affirming the MPSC's July 23, 2002 order. In its opinion, the Court also found that MCL 247.183 requires local consent for a petroleum products pipe line constructed in a limited access highway rights of way.

> We hold that the statute as amended, requires the consent of the affected local governments. [Court of Appeals Opinion, p 1; Apx 557b.]

The Court of Appeals' decision also concluded that the City's consent to the proposed pipe line was not a prerequisite to MPSC approval.

Both Wolverine Pipe Line Company and the City of Lansing sought leave to appeal. This Court granted leave to appeal and directed the parties to include among the issues to be briefed "whether Wolverine Pipe Line Company is a "public utility" as that term is used in MCL 247.183, and the manner and extent to which paragraph (1) and (2) of MCL 247.138 apply to this case." (Order, 9/26/03; Apx 564b).

STATEMENT OF THE QUESTIONS PRESENTED

I.

IS WOLVERINE PIPE LINE COMPANY A "PUBLIC UTILITY" WITHIN THE MEANING OF THE MICHIGAN CONSTITUTION 1963, ART 7, § 29 AND MCL 247.183?

The City of Lansing answers "Yes."

Wolverine Pipe Line Company answers "Yes."

The Court of Appeals answers "Yes."

The MPSC answers "Yes."

II.

MUST WOLVERINE PIPE LINE COMPANY DEMONSTRATE THAT IT HAS OBTAINED LOCAL CONSENT IN ITS APPLICATION TO THE MPSC WHERE MPSC RULE 460.17601(1) REQUIRES SUCH A SHOWING IF LOCAL CONSENT IS REQUIRED AND THE MICHIGAN CONSTITUTION AND MCL 247.183(1) REQUIRE LOCAL CONSENT IN THESE CIRCUMSTANCES?

The City of Lansing answers "Yes."

Wolverine Pipe Line Company answers "No."

The Court of Appeals answers "no" to the question of whether an applicant must demonstrate local consent in its application but "yes" to the question of whether local consent is required before construction.

The MPSC answers "no" to the question of whether an applicant must demonstrate local consent in its application and did not address the question of whether local consent is required before construction.

CONCISE STATEMENT OF FACTS AND PROCEEDINGS

A. The Nature Of The Action.

This appeal and cross appeal arise out of Wolverine Pipe Line Company's plan to construct and operate a twenty-six mile liquid petroleum products pipe line, a portion of which Wolverine Pipe Line sought to locate within the City of Lansing along a public highway.

B. The MPSC Proceedings.

On or about December 6, 2001, Wolverine filed an application for a certificate of pubic convenience with the MPSC seeking approval for the construction of a twelve inch petroleum pipe line approximately twenty-six miles in length. (Wolverine Pipe Line Application; Apx 28b). Nearly seven miles of the pipe line would be operated and maintained by Wolverine within Lansing city limits.[1] This application replaced Wolverine's earlier application of March 3, 2000 (MPSC Case No. U-12334) in which it proposed placing a new pipe line alongside its existing pipe line route, which travels through East Lansing and Meridian Township (Okemos). In that case, the MPSC determined the pipe line was necessary but it did not approve the route requested through East Lansing and Okemos as Wolverine withdrew its route request after considerable objection was made by the residents of East Lansing and Okemos. After withdrawing its application for use of its current route, for which it already has easements, Wolverine filed a new route application that proposed placing the pipe line in the I-96 right of way through the City of Lansing. (*Id.*)

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[1]The pipe line's length has proven to be flexible depending on the context and location. However, it traverses at least four miles within city limits and seven miles of Board of Water and Light wellhead territory.

Prior to this application, the Michigan Department of Transportation had not allowed the placement of petroleum product pipe lines in highway rights of way. As such, MCL 247.183(1), MCL 247.184, and Const 1963, art 7, § 29, all of which require the consent of a municipality before a public utility can be constructed in a public road right of way, had not been addressed in the context of an MPSC application.

In response to this newly submitted route application, the City filed a petition to intervene, which was granted. (Petition to Intervene; Apx 39b). A hearing was held on March 25 and 26, 2002 where seventeen witnesses were cross examined. The City sought to cross examine witnesses concerning the reasons for the abandonment of the first route and selection of the second. But this inquiry was disallowed by the administrative law judge on the basis that such questions pertained to "settlement discussions" which resolved MPSC case No. U-12334.

At the conclusion of the hearing, the City moved for summary disposition under MCR 2.116(C)(4) based on the fact that testimony showed that Wolverine did not have or submit the consent of the City of Lansing when it filed its route application with the MPSC. The City argued that MPSC Rule 601(2)(d), as well as MCL 247.183(1), MCL 247.184, and Const 1963, art 7, § 29, required this consent before the MPSC could order construction of the pipe line through the City.

On July 23, 2002, the MPSC entered an opinion and order which, among other things, denied the City's motion to dismiss and authorized Wolverine to construct, operate, and maintain a twelve-inch petroleum products pipe line from a point near the intersection of Interstate 96 and Meridian Road, Ingham County, to the Lansing terminal of Marathon Ashland Petroleum in Clinton County by following the I-96 right of way. (MPSC Opinion and Order; Apx 519b). The MPSC Order determined that its rule referring to "a common carrier for which approval is

required by statute" did not mean for which approval is required by any statute or constitutional provision, but that it was limited to approval which is specifically required by Act 16. (*Id.*) Thus, it reached the conclusion that the consent requirements of MCL 247.183(1), MCL 247.184 and Const 1963, art 7, § 29, can be ignored by MPSC applicants at the time of the application process. (*Id.*)

The MPSC also determined that no equal protection violations occurred in Wolverine's route selection, and that even if constitutional rights were violated, it did not matter since the MPSC's only concern and criteria are whether the pipe line was necessary and convenient. (MPSC Order, p 20; Apx 538b). The MPSC also upheld the administrative law judge's ruling that cross examination questions concerning the reasons for the route choice were properly excluded from the hearing. Lastly, the MPSC ruled that the proposed pipe line was necessary and that the route proposed was safe and reasonable. (MPSC Order, pp 22-36; Apx 540b-554b).

C. The Court Of Appeals Decision.

The City then appealed this decision to the Court of Appeals raising several issues that it believed were incorrectly decided by the MPSC. On June 5, 2003, the Court of Appeals issued an opinion in which it correctly held that, as a matter of law, local governmental consent for construction of a petroleum products pipe line in a limited access highway right of way is required. (Court of Appeals Opinion; Apx 557b). Having said that, the Court of Appeals erroneously concluded that the applicant was not obligated to demonstrate that it had obtained local consent as part of the application process. (*Id.*)

D. The Application And Cross-Application For Leave To Appeal.

Wolverine Pipe Line sought leave to appeal to this Court and the City filed a cross-application for leave to appeal. This Court granted both applications and directed expedited briefing. (Order; Apx 564b).

SUMMARY OF THE ARGUMENT

Since the time of Alexis De Toqueville and before, a part of the unique genius of the American system of government is the important role given to local government. See Alexis De Toqueville, *Democracy in America*, Volume 1, pp 74-76, 112-119, 302-304, 310, 313-332 (F Bowen ed, 1863, revised and edited). As De Toqueville pointed out, the partisans of centralization claim that a central government can better "administer the affairs of each locality better than the citizens could for themselves." But such a system lodges decision making far from the reach of the citizens, and impairs their ability to democratically govern themselves. *Id.* Michigan's constitutional and statutory history confirm that the drafters of the Michigan Constitution and the legislators who enacted numerous statutes pertaining to local governments, have sought to create a vibrant and significant role for the entities governing at the local level.

Thus, the Michigan Constitution gave cities the power of home rule and specified that "no enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section." Const 1963, art 7, § 22. The Constitution also empowered Michigan cities (and other local governments) with "reasonable control of their highways, streets, alleys and public places." Const 1963, art 7, § 29. And the Constitution directed the courts to give a liberal or broad construction to these constitutional provisions. Const 1963, art 7, § 34. It specifically instructs that "[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." *Id.*

The issues raised in this appeal and cross appeal must be viewed within this context. *Sweatt v Dep't of Corrections*, 468 Mich 172, 179; 661 NW2d 201(2003). The City of Lansing and its Mayor seek to vindicate important principles of local control that are embodied in

Michigan's constitution, have repeatedly been enacted into statutes dealing with local highways, streets, and public places, and are required to be respected by the Michigan Public Service Commission, both as a matter of statute and as a matter of enforcement of its own rules. The Michigan Constitution, article 7, § 29 grants cities reasonable control over the highways within their borders. MCL 247.183 likewise requires public utilities seeking to build pipelines or other utility structures on, over, under, or across these public highways or places to obtain local consent before doing so. The Michigan Public Service Commission, as part of its regulatory authority and responsibility, is obligated to ensure that they do so. See MCL 460.1 et seq., MCL 438.1 et seq., and Mich Admin Code R 460.17601(c).

The accepted rules of statutory, constitutional, and rule interpretation require this Court to give effect to the plain meaning of the text. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). They also obligate the Court to evaluate the words or phrases within the context of the statute as a whole and to harmonize related statutes, rules, and constitutional provisions. See generally, *Tyler v Livonia Public Schools*, 459 Mich 382, 390-391; 590 NW2d 560 (1999).

The MPSC failed to require Wolverine Pipe Line to demonstrate that it had obtained local consent from the City of Lansing when it filed its application for approval for a pipeline project that is planned to run through the City of Lansing. Although the Michigan Court of Appeals correctly held that local consent is required before Wolverine commences construction, it erroneously allowed the MPSC to approve the project in violation of its own rules and without the necessary consent. This was reversible error.

This Court should read the various statutes pertaining to public utility pipelines on or under public highways, the MPSC regulatory authority, and the Michigan constitutional

provisions together to rule in favor of the City of Lansing. MCL 247.183 governs and Wolverine is obligated to satisfy both subsection (1) and subsection (2). Thus, Wolverine must obtain local consent before it commences construction of any pipeline through a city. Such a reading is consistent with the clear text, the grammar and punctuation used, the related statutes, and the constitutional requirements. The Court of Appeals correctly so held and that ruling should be affirmed. But the MPSC rules required Wolverine to demonstrate that it had obtained the necessary consent as part of its application. The Court of Appeals erred in failing to enforce this requirement. Therefore, this aspect of the Court's ruling should be reversed and the MPSC order should be vacated because Wolverine failed to submit an application that satisfied the MPSC's rules.

ARGUMENT I

WOLVERINE PIPE LINE IS A "PUBLIC UTILITY" WITHIN THE MEANING OF THE MICHIGAN CONSTITUTION 1963, ART 7, § 29 AND MCL 247.183.

A. Standard Of Review.

The issue presented requires this Court to ascertain the meaning and proper interpretation of MPSC Rule 460.17601(1) and MCL 247.183(1) and touches on the meaning of Const 1963, art 7, § 29. Issues of constitutional, statutory, and rule interpretation are questions of law and this Court reviews them de novo. *State Farm Fire & Casualty Co v Old Republic Ins Co*, 466 Mich 142, 145-46; 644 NW2d 715 (2002). An MPSC order is unlawful if it is based on an erroneous interpretation or application of the law. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259; 140 NW2d 515 (1966).

B. The Historical Background And Context Within Which The Michigan Constitutional Provisions And Statutes Were Enacted.

1. The Rule Of Common Understanding.

A primary rule in construing provisions of the constitution is the rule of common understanding. *Federated Publications, Inc v Michigan State University Bd of Trustees*, 460 Mich 75, 84; 594 NW2d 491 (1999). This Court has embraced Justice Cooley's explanation of this principle:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves would give it. [*Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971) citing Cooley, Constitutional Limitations (6th ed), p 81.]

This Court has also taught that it is appropriate to consider "the circumstances surrounding the adoption of the provision and the purpose it is designed to accomplish. *Bolt v Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). If the text includes a technical, legal term then the court is to rely on the understanding of the term by those sophisticated in the law understood at the time of the constitutional drafting and ratification. *Silver Creek Drain Dist v Extrusions Division, Inc*, 468 Mich 367; 663 NW2d 436 (2003). See also *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212; 634 NW2d 692 (2001).

2. The History Of Franchises To Public Utilities.

Review of the history of municipal power over public utilities is helpful in understanding the meaning of the Michigan Constitution's use of the term public utility as well as in examining its meaning as employed in various statutes. Public utilities have a long history of receiving "special franchises" or consent from local governments in order to use the streets and highways. A franchise means "the right granted by the state or a municipality to an existing corporation or to an individual to do certain things a corporation or individual otherwise cannot do such as the right to use a street or alley for a commercial or street railroad track, or to erect thereon poles and string wires for telegraph, telephone, or electric light purposes, or to use the street or alley underneath the surface for water pipes, gas pipes, or other conduits." *The Washington Water Power Co v Rooney*, 101 P2d 580, 583 (Wash, 1940) quoting McQuillin, Law of Municipal Corporations (2d ed), § 1740.

This concept can be traced back to Blackstone who said that a franchise was a "royal privilege or branch of the king's prerogative, subsisting in the land of a subject." *McCutcheon v Wozencraft*, 255 SW 716 (Tex App, 1923) quoting Blackstone. The great weight of authority in this country holds that the grant of rights to use the street should be regarded as "not so much

privileges, but rather as functions delegated to private individuals to be performed for the furtherance of the public welfare and subject to public control." 255 SW at 718. Although in the past, municipal authorities may not have been empowered to grant or withhold franchises, "the tendency of modern legislation is to delegate to the local authorities the exclusive dominion over the streets of the respective municipalities, and the value of local self-government in this respect is self evident...." *Id.*

The earliest discussion in this country of what constitutes a franchise appeared in *Bank of Augusta v Earle*, 38 US 519; 10 L Ed 274 (1839), where the Supreme Court called it a "special privilege conferred by government on individuals, and which do[es] not belong to the citizens of the country, generally of common right." *Id.* at 595. See also *Community Tele-Communications, Inc v The Heather Corp*, 677 P2d 330, 336 (Colo, 1984). A franchise differs from some privileges or permissions that may be granted by a city:

> It is not, however, every privilege or permission granted by state or city to occupy or to use public rivers, highways, or streets that rises to the dignity of a franchise. A privilege granted by a city to a private party to occupy or use a portion of a public street temporarily for the construction of a building upon an abutting lot, for a cab stand, an apple stand, or for any similar commercial purpose is a license and not a franchise. The exact line of demarcation between franchises and licenses may not be clearly drawn, but their general characters and limits are so well known and so clearly established that it is not difficult to assign many rights granted to the class they belong. [*Oklahoma Electric Cooperative, Inc v Oklahoma Gas & Electric Co*, 982 P2d 512, 515 (Okla, 1999) quoting *McPhee & McGinnity Co v Union Pacific R Co*, 158 F 5, 10 (CA 8, 1907).]

The notion that municipalities could grant franchises to public utilities to use the streets and public places was discussed extensively in Dillon's well-known and early treatise on municipal law. Dillon, The Law of Municipal Corporations (5th ed, 1911), § 1210. Dillon explained that the "courts have properly held the term franchise to be applicable to the right to construct, maintain, and operate railroads in the public streets and highways, or water mains and

water works, gas pipes and lighting works, and poles and wires for the transmission and distribution of electricity. *Id.* See also, *West Texas Utilities Co v City of Baird*, 286 SW2d 185 (Tex App, 1956) (without a franchise from the city, utility has no right to use streets).

3. The Michigan Experience.

Michigan courts have recognized these concepts and have long dealt with issues arising out of public utilities and the special franchises that they have sought. In *Twp of Lansing v Lansing*, 356 Mich 338; 97 NW2d 128 (1959), the Court explained that permission to conduct a public utility amounts to a special privilege or "franchise" to operate in ways not ordinarily allowed to other corporations. *Id.* Traditionally, by both common law, statute, and constitutional provision, public utilities were not permitted to acquire the right to make a special or exceptional use of a public highway except by a grant from the sovereign power. Some state constitutions, such as Michigan's, confer on cities or other local governments the final right to decide whether a public utility may use or occupy the streets. 12 McQuillin, Law of Municipal Corporations (1995), § 34.13, p 48. See e.g., *Denver v Mercantile Trust Co*, 201 F 790 (CA 8, 1912).

Michigan's constitutional history reflects increasing attention by the drafters to the powers and prerogatives of local government, and among them the right to control local streets and highways as it relates to public utilities. In the Constitution of 1835, Michigan's first constitution after the Northwest Ordinance, the only attention paid to the creation or powers of any government except the three branches of state government was set forth in article 7, which contained a single provision relating to county officers, and most specifically the sheriff. Const 1835, art 7, § 4. By 1850, the constitution paid further attention to local government; it included two articles dealing with local government, article 10, which dealt with counties, and article 11, which dealt with townships. Const 1850, art 10-11.

In 1908, for the first time, the constitution addressed public utilities, and predictably it did so by dealing with them in the context of franchises. Article 7, § 19 provided:

> No township shall grant any public utility franchise which is not subject to revocation at the will of the township, unless such proposition shall have first received the affirmative vote of a majority of the electors of such township voting thereon at a regular or special election.

The constitution also added a provision prohibiting a city of village from acquiring a public utility or granting a franchise "which is not subject to revocation at the will of the city or village, unless such proposition shall have received the affirmative vote of 3/5 of the electors of such city or village voting thereon at a regular or special municipal election; and upon such proposition women taxpayers having the qualifications of male electors shall be entitled to vote." Const 1908, art 8, § 28.

The constitution of 1908 also added a provision granting local governments the right to consent to the use of highways, streets, alleys or other public places. Const 1908, art 8, § 28. That section provided:

> No person, partnership, association or corporation operating a public utility shall have the right to use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks, or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such a city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships. [Const 1908, art 8, § 28.]

For the first time, local governments were empowered to control their streets and this power was announced in connection with their right to deal with public utilities. The text provided a local government with two powers: (1) the right to grant or withhold consent to public utilities seeking to use public places, such as highways and streets, for their pipes, wires, or other structures and

(2) the right to grant or withhold a franchise to transact a local business within the city. The text underscored the importance of these rights by stating that the right of cities to "reasonable control of their streets, alleys, and public places is hereby reserved" to them.

Today's constitution has substantially similar provisions, requiring a vote of electors before a city or village acquires or sells a public utility, preventing townships and cities from granting franchises that are for a period of more than thirty years, and reserving to the local governments the "reasonable control of their highways, streets, alleys and public places." Const 1963, art 7, §§ 19, 25, 29, and 30. The provision that requires local consent to use the streets and highways provides:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the rights of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government. [Const 1963, art 7, § 29.]

From Blackstone's time to today in Michigan, the right of a public utility to use a highway or street has always been subject to the sovereign power of the government. The sovereign power to grant permission to use highways has traditionally been exercised by the state unless it was delegated legislatively or constitutionally to some other level of government. Many states, including Michigan, ultimately delegated the power to grant a public utility the right to use the streets to the local government by adopting constitutional provisions that explicitly preserved the local government's right to control of its streets, highways, and public places. The issues in this case arise within this context and history.

C. Wolverine Pipe Line Is A "Public Utility" As That Term Is Commonly And Traditionally Defined.

The Michigan Constitution and various statutes employ the term "public utility" when addressing aspects of local government powers, the use of highways, and the regulatory authority of the Michigan Public Service Commission. See Const 1963, art 7, § 29; MCL 247.183; MCL 483.1 et seq; MCL 460.6. The term "public utility" has been defined as a "business or enterprise [that is] impressed with a public interest, and those engaged in that business must hold themselves out as serving or ready to serve all members of the public to the extent of their capacity, and the nature of the service must be such that all members of the public have an enforceable right to demand it." 12 McQuillin, Law of Municipal Corporations (1995), § 34.08, p 27. According to McQuillin the test for determining whether an entity is a public service is "whether the public utility serves the public, whether the public may enjoy its services outright or by permission only, and whether it is subject to appropriate governmental regulation." *Id.* This definition comports with the use of the term "public utility" in the Michigan Constitution, in MCL 247.183, MCL 483.1 et seq., and in MCL 460.1 et seq. See *Schurtz v Grand Rapids*, 208 Mich 510, 524; 175 NW 421 (1919).

D. Wolverine Pipe Line Is A "Public Utility" As Used In Const 1963, Art 7, § 29 And MCL 247.183.

Michigan's constitution employed the term "public utility" in art 7, § 29 of the 1963 Constitution. The drafters did not define the term. Thus, this Court must interpret it in terms of the understanding of drafters and ratifiers at the time. The language explicitly mentions use of "wires, poles, pipes, tracks, conduits, or other utility facilities," which would encompass the pipes used for Wolverine Pipe Line's projects. Thus, the surrounding text supports the notion that Wolverine is a public utility within the meaning of art 7, § 29. Moreover, the term "public

utility" as defined by Michigan courts has traditionally encompassed gas pipe lines. See e.g. *Schurtz v Grand Rapids*, 208 Mich 510, 524; 175 NW 421 (1919); *White v Welsh*, 291 Mich 636; 289 NW 279 (1939); *City of Traverse City v Consumers Power Co*, 340 Mich 85; 64 NW 894 (1954).[2] The classic definition for public utility as used in Michigan and other jurisdictions likewise encompasses Wolverine Pipe Line because it serves the public as a common carrier, can construct pipe lines only by permission, and is subject to government regulation.

Wolverine is a "public utility" within Michigan's statutory framework as well. We can look to the second sentence of MCL 247.183(1), which states that "A telegraph, telephone, power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained." Wolverine Pipe Line Company is one of the "other public utility" companies encompassed by this phrase. It is only logical to assume that when using the phrase "other public utilities" in this context, the legislature had in mind any and all public utilities that it designated as such in other regulatory statutes.

MCL 483.1 et seq. and MCL 460.6 both designate oil and gas pipe line companies as public utilities subject to MPSC jurisdiction. MCL 483.1 provides:

> Every corporation, association or person now or hereafter exercising or claiming the right to carry or transport crude oil or petroleum, or any of the

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[2]Michigan courts have considered the definition of a public utility used in art 7, § 25 and held that it encompassed a list not including cable television or sewer systems. See *White v Ann Arbor*, 406 Mich 554; 281 NW2d 283 (1979). See also *Holland v Clerk of Garden City*, 299 Mich 465; 300 NW2d 777 (1941). But this narrow definition was based on limiting language present in § 25 that was not included in art 7, § 29. See *Charter Twp of Meridian v Roberts*, 114 Mich App 803, 809; 319 NW2d 678 (1982). Whatever the merits of those decisions, Wolverine Pipe Line fits within the classic definition of a "public utility," rather than within the possible outer reaches of that term as addressed in those decisions.

> products thereof, by or through pipe line or lines, for hire, compensation or otherwise, or now or hereafter exercising or claiming the right to engage in the business of piping, transporting or storing crude oil or petroleum, or any of the products thereof, or now or hereafter engaging in the business of buying, selling or dealing in crude oil or petroleum, within the limits of this state, shall not have or possess the right to conduct or engage in said business or operations, in whole or in part, as above described, or have or possess the right to locate, maintain, or operate the necessary pipe lines, fixtures, and equipment thereunto belonging, or used in connection therewith, concerning the said business of carrying, transporting or storing crude oil or petroleum as aforesaid, on, over, along, across, through, in or under any present or future highway, or part thereof, or elsewhere, within the state, or have or possess the right of eminent domain, or any other right or rights, concerning said business or operations, in whole or in part except as authorized by and subject to the provisions of this act, except, further, and only such right or rights as may already exist which are valid, vested, and incapable of revocation by any of this state or of the United States.

The statute empowers a corporation transporting crude oil or petroleum to use the power of eminent domain and to locate pipe lines, fixtures and equipment on, along, or under any highway. See also MCL 483.2. Because the legislature provided this special power, it vested regulatory authority in the MPSC. MCL 483.3. It also obligated such corporations to be common purchasers and common carriers. MCL 483.4 and MCL 483.5. This statutory scheme creates a classic example of a public utility. See McQuillin, *supra*. In other words, because the corporation is granted special privileges (such as using the public streets for its pipes or employing eminent domain to obtain needed property rights), it is required to operate in the public interest, and is subject to regulation.

Likewise, MCL 460.6, which vests power to regulate "all public utilities in the state" (with certain denominated exceptions) in the MPSC, specifically includes "oil, gas, and pipeline companies." MCL 460.6. The language provides:

> The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. The public service

> commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, pipeline companies; motor carriers; and all public transportation and communication agencies other than railroads and railroad companies.

Since it is a general rule of construction that lawmakers are presumed to know of and legislate in harmony with existing laws, a proper reading of MCL 247.183(1) would conclude that the legislature intended to include oil and gas pipe lines under its umbrella of "other public utility" companies when it used this phrase. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 315; 645 NW2d 34 (2002). Secondly, when interpreting a statute the Court considers the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). In other words, a word or phrase is given meaning by its context or setting. *Tyler v Livonia Public Schools*, 459 Mich 382, 390-391; 590 NW2d 560 (1999). Under this approach, oil and gas pipe lines as defined in Michigan's public service statutes amount to "other public utilities" within the meaning of MCL 247.183(1).

Michigan courts have traditionally applied these principles to conclude pipe line companies are public utilities. In the 1994 case of *Bruce Twp v Gout*, 207 Mich App 554; 526 NW2d 40 (1994), the Court of Appeals defined a public utility for purposes of applying subsection (1) of MCL 247.183. A gas association had installed an underground pipe line within the public right-of-way of a county road located in Bruce Township without seeking the township's consent. After the pipe line was substantially completed, the township filed suit seeking injunctive relief and removal of the pipe line. The township cited both Const 1963, art 7,

§ 29 and MCL 247.183 as support for its position.. Although the Court concluded that the township's refusal to give its consent under "any circumstance" was unreasonable, it held:

> "public utility" means every corporation, company, individual, or association that may own, control, or manage, except for private use, any equipment, plant, or generating machinery in the operation of a public business or utility; utility means the state or quality of being useful. [*Bruce Twp* at 558.]

And

> We agree with the trial court's conclusion on remand that there was no dispute that defendant Lakeville was a public utility under the above definition: it was in the business of producing, transporting, processing, and selling natural gas; all of the natural gas it produced was sold to a public utility (Michigan Consolidated Gas Company) for distribution to the public; and it did not use any of the natural gas for its own purposes, or sell it to anyone else. Clearly, defendant's pipe line was useful to the public. [*Bruce Twp* at 558-559.]

This analysis applies to Wolverine Pipe Line as well.

CFR 645.105(m) defines a "utility" as a privately, publicly, or cooperatively owned line, facility or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or directly serves the public. The term utility under 23 CFR 645.105(m) also means the utility company inclusive of any wholly owned or controlled subsidiary. An important part of the 23 CFR 105(m) definition of a utility is the fact that it "directly or indirectly serves the public." This same characteristic, which was contained in the CFR definition, was also used by the Court in *Bruce Twp v Gout*, 207 Mich App 554, 558; 526 NW2d 40 (1994).

Wolverine is also a utility as defined by 23 CFR § 105(m); it is therefore also bound by the requirements of MCL 247.183(2). Thus, the Michigan Legislature's designation of oil and

gas pipe lines as public utilities in Act 16, the definition of a public utility in *Bruce Twp*, and the CFR definition all include Wolverine Pipe Line Company.

The dispute between the parties centers around whether Wolverine is subject to MCL 247.183(1). Wolverine argues that subjection (1) and subsection (2) are two separate classifications. It contends that because it seeks to build longitudinally within a limited access right-of-way and satisfies the definition of utility in 23 CFR 645.105, it does not need to obtain local consent. Wolverine does not argue that it is not bound by MCL 247.183(1) because it is not a public utility within the meaning of that provision. Wolverine argues that because it satisfies the definition of utility under 23 CFR 645.105 and is seeking to build pipes longitudinally within a limited access highway, it is only bound by the requirements of subsection (2). Wolverine's position is inconsistent with the plain meaning of the statute, would violate other accepted rules of statutory interpretation, would render the statute unconstitutional, and was therefore properly rejected by the Court of Appeals.

Wolverine Pipe Line Company is in the business of producing, transporting, processing, and selling petroleum products for sale and distribution to the public. As such, it is a utility as contemplated by Const 1963, art 7, § 29, MCL 247.183(1) and MCL 247.183(2). In fact, Wolverine has never argued below that it is not a public utility and readily admits it is included in the 23 CFR 105(m) definition of a utility[3]. As such, it is required to abide by all state laws applicable to public utilities.

[3]Court of Appeals, oral argument transcript p 47.

ARGUMENT II

WOLVERINE PIPE LINE WAS OBLIGATED TO DEMONSTRATE THAT IT HAD LOCAL CONSENT AS PART OF ITS APPLICATION TO THE MPSC BECAUSE MPSC RULE 406.17601(1) REQUIRES SUCH A SHOWING IF LOCAL CONSENT IS REQUIRED BY LAW AND THE MICHIGAN CONSTITUTION ARTICLE VII, SECTION 29 AND MCL 247.183(1) REQUIRE LOCAL CONSENT.

A. Standard Of Review.

The issue presented requires this Court to ascertain the meaning and proper interpretation of MPSC Rule 460.17601(1) and MCL 247.183(1). Issues of constitutional, statutory, and rule interpretation are questions of law and this Court reviews them de novo. *State Farm Fire & Casualty Co v Old Republic Ins Co*, 466 Mich 142, 145-146; 644 NW2d 715 (2002). An MPSC order is unlawful if it is based on an erroneous interpretation or application of the law. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259; 140 NW2d 515 (1966).

B. A Textualist Approach To The Constitutional, Statutory, And Rule Provisions At Issue Here Supports The City Of Lansing's Position That Wolverine Must Have Local Consent To Use The Highways In A City And That It Must Demonstrate Local Consent With Its Application To The MPSC.

1. The Textualist Approach.

The critical questions before this Court are (1) whether an applicant to the MPSC must obtain local consent before commencing construction and (2) whether it must demonstrate that it has the local consent of a city to a pipe line proposed to be constructed within city limits at the application stage. In other words, does MPSC Rule 460.17691(1)(c) require Wolverine Pipe Line to obtain the City of Lansing's prior consent before applying to the MPSC for permission to construct this pipe line system.

Because this Court's judicial role precludes imposing different policy choices than those selected by the Legislature, it is obligated to discern the legislative intent that may reasonably be inferred from the words expressed in a statute by examining the statutory language. *White v Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979). A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993). When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995); *Lake Angelus v Oakland Co Rd Comm*, 194 Mich App 220, 224; 486 NW2d 64 (1992). In construing a statute, this Court gives the words used by the Legislature their common, ordinary meaning. MCL 8.3a; MSA 2.212(1).

These traditional principles of statutory construction force courts to respect the constitutional role of the Legislature as the policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility. Any other nontextual approach to statutory construction necessarily invites judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences. See *Cady v Detroit*, 289 Mich 499, 509; 286 NW 805 (1939) ("Courts cannot substitute their opinions for that of the legislative body on questions of policy"). This Court has cautioned against "Herculean effort[s]" to avoid the clear language of a statute or rule by creating "an ambiguity where none exists in order to achieve the desired result...." *People v McIntire*, 461 Mich 147, 153-54; 599 NW2d 102 (1999). The statutory and rule interpretation issues presented here should also be read against the

background or fabric of the law governing a public utility's efforts to use the streets or highways of a city. The statutes governing public utilities, those empowering the MPSC to regulate them, and those dealing with local consent for use of highways do "not stand alone and thus cannot be read in a vacuum." *Sweatt v Dept of Corrections*, 468 Mich 172, 179; 661 NW2d 201 (2003). Instead, the statutes, MPSC rules, and Michigan constitutional provisions must be read in context, and "construed in the light of history and common sense." *Id.* quoting *Arrowhead Development Co v Livingston Co Road Comm*, 413 Mich 505, 516; 322 NW2d 702 (1982).

When the language of the statute is clear, it is assumed that the Legislature intended the plainly expressed meaning, and the statute must be enforced as written. *Hiltz v Phil's Quality Market,* 417 Mich 335; 337 NW2d 237 (1983). Second, statutes are to be read in pari materia, meaning when two statutory provisions have a common purpose, the terms of the provisions should be read to be read together so as to give the fullest effect to each provision. *Glover v Parole Bd*, 460 Mich 511; 596 NW2d 598 (1999). Third, the Court is to avoid any interpretation that would render part or all of a statute nugatory and meaningless. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999).

2. Wolverine Is Obligated To Obtain Local Consent.

The City of Lansing believes that Wolverine is obligated to obtain local consent and that it must do so before it applies for MPSC approval of its project. This reading harmonizes the rule with the statutory backdrop and the constitutional overlay. The Michigan Constitution, specifically preserves to local governments, the reasonable control over their streets:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact

> local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government. [Const 1963, art 7, § 29]

This constitutional provision stems from an earlier provision in the 1908 constitution, which similarly preserved local control of highways, streets, alleys, or other public places to the local units of government. Const 1908, art 8, § 28. The language from the 1908 constitution was changed to add counties to the local governments with control of utilities occupying the public right-of-ways within their borders. State of Michigan Official Record Vol II, Constitutional Convention 1961, p 3394. The language was also changed to add the words "public or private" to make clear that both types of utilities are subject to the restrictions set forth in the provision. *Id.*

This constitutional provision has been routinely enforced. See generally, *Union Twp v City of Mt Pleasant*, 381 Mich 82, 86-87; 158 NW2d 905 (1968); *Compton Sand & Gravel Co v Dryden Twp*, 125 Mich App 383, 394; 336 NW2d 810 (1983); *Robinson Twp v Ottawa County Bd of Road Comm'rs*, 114 Mich App 405; 319 NW2d 589 (1982) lv den 414 Mich 955 (1982). And it requires the consent of the City of Lansing before a public utility such as Wolverine Pipe Line Company can construct its gasoline pipe line in the I-96 right of way located within the city. See also *City of Niles v Michigan Gas & Electric Co*, 273 Mich 255; 262 NW 900 (1935).

The Michigan Legislature, in accord with these constitutional strictures, has embodied the requirement that local consent be obtained before a utility constructs facilities in a public place, road, bridge, street, or road in MCL 247.183. The provision falls with Chapter 247, which deals with highways. MCL 247.171 et seq governs highway encroachments and obstructions. MCL

247.183 addresses the use of highways by public utilities. It provides substantive standards for consideration and approval of the construction of pipe lines on highway right-of-ways:

> Sec. 3(1) Telegraph, telephone, power, and other public utility companies, cable television companies, and municipalities may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or under any public road, bridge, street, or public place, including, subject to subsection (2), longitudinally within limited access highway rights-of-way, and across or under any of the waters of this state, with all necessary erections and fixtures for that purpose. A telegraph, telephone, power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained. [MCL 247.183(1)]

The text explicitly requires the utility company to obtain the consent of the governing body of the city before commencing construction.

Subsection (2) of MCL 247.183 imposes further requirements on those utilities that satisfy the definition of 23 CFR 645.105(m) and are seeking to construct utility lines or structures "longitudinally within limited access highway rights-of-way" in a manner that conforms to federal laws and regulations as approved by the state transportation commission. The text of subsection (2) addresses charges for use of the highway rights-of-way and deals with the use of revenue received under the subsection:

> A utility as defined in 23 C.F.R. 645.105(m) may enter upon, construct, and maintain utility lines and structures longitudinally within limited access highway rights-of-way in accordance with standards approved by the state transportation commission that conform to governing federal laws and regulations. The standards shall require that the lines and structures be underground and be placed in a manner that will not increase highway maintenance costs for the state transportation department. The standards may provide for the imposition of a reasonable charge for longitudinal use of limited access highway rights-of-way. The imposition of a reasonable charge is a governmental function, offsetting a portion of the capital and maintenance expense of the limited access highway, and is not a proprietary function. The charge shall be calculated to reflect a 1-time installation permit fee that shall not

> exceed $1,000.00 per mile of longitudinal use of limited access highway rights-of-way with a minimum fee of $5,000.00 per permit. All revenue received under this subsection shall be used for capital and maintenance expenses incurred for limited access highways.

The history of this statute supports the Court of Appeals decision that local control is required. Chapter 13 of the State Highway Code, MCL 247.171 et seq., was originally enacted as part of 1925 PA 368 and section 183 of the statute was amended several times. Prior to 1989, it consisted of a single paragraph that contained two sentences. In pertinent part, the statute authorized public utility companies "to enter upon, construct and maintain" pipe lines under any public road, provided that

> Every such telegraph, telephone, power, and all other public utility company, cable television company and municipality, before any of the work of such construction and erection shall be commenced, shall first obtain the consent of the duly constituted authorities of the city, village, or township through along which said lines and poles are to be constructed and erected. [Former MCL 247.183, amended 1972.]

In 1989, the Legislature amended section 183 by adding a second subsection and by changing phrases within the first subsection. The first subsection was rewritten to say:

> (1) Telegraph, telephone, power, and other public utility companies, cable television companies, and municipalities are authorized to enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers and like structures upon, over, across, or under any public road, bridge, street, or public place, *except longitudinally within limited access highway rights of way*, and across or under any of the waters in this state, with all necessary erections and fixtures for that purpose. A telegraph, telephone, power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained. [Former MCL 247.183(1), amended 1989; emphasis added.]

The Legislature's insertion of the phrase "except longitudinally within limited access highway rights of way" in the first sentence of subsection (1) makes it clear that projects that were located

longitudinally within limited access highway rights-of-way were exempted from the provisions of this subsection, including those requiring local consent.

The newly added subsection (2) established certain standards that 23 CFR 645.105(m) utilities must follow when constructing and maintaining utility lines longitudinally within limited access highway rights of way:

> (2) The state transportation department may permit a utility as defined in 23 C.F.R. 645.105(m) to enter upon, construct, and maintain utility lines and structures, longitudinally within limited access highway rights of way in accordance with standards approved by the state transportation commission. Such lines and structures shall be underground or otherwise constructed so as not to be visible. That standards shall conform to governing federal laws and regulations and may provide for the imposition of a reasonable charge for longitudinal use of limited access highway rights of way. The imposition of such charges constitutes a governmental function, offsetting a portion of the capital and maintenance expense of the limited access highway, and is not a proprietary function. All revenue received under this subsection shall be used for capital and maintenance expenses incurred for limited access highways. [Former MCL 247.183(2), amended 1989.]

The language of the 1989 amendment to subsection (1), which is so heavily relied on by Wolverine, was short-lived. In 1994, the Legislature removed the language it had added in 1989, which had excepted utilities located longitudinally within limited access highway rights of way from its consent requirement and added language that specifically included them. The 1994 statute, which is the one applicable here, was changed to read as follows:

> (1) Telegraph, telephone, power, and other public utility companies, cable television companies, and municipalities may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or under any public road, bridge, street, or public place, *including, subject to subsection (2)*, longitudinally within limited access highway rights-of-way, and across or under any of the waters in this state, with all necessary erections and fixtures for that purpose. A telegraph, telephone, power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained.

> (2) A utility as defined in 23 C.F.R. 645.105(m) may enter upon, construct, and maintain utility lines and structures longitudinally within limited access highway rights-of-way in accordance with standards approved by the state transportation commission that conform to governing federal laws and regulations. The standards shall require that the lines and structures be underground and be placed in a manner that will not increase highway maintenance costs for the state transportation department. The standards may provide for the imposition of a reasonable charge for longitudinal use of limited access highway rights-of-way. The imposition of a reasonable charge is a governmental function, offsetting a portion of the capital and maintenance expense of the limited access highway, and is not a proprietary function. The charge shall be calculated to reflect a 1-time installation permit fee that shall not exceed $1,000.00 per mile of longitudinal use of limited access highway rights-of-way with a minimum fee of $5,000.00 per permit. All revenue received under this subsection shall be used for capital and maintenance expenses incurred for limited access highways. [MCL 247.183(1) & (2); emphasis added.]

This about-face by the legislature demonstrates a clear and conscious intention to include the 23 CFR 645.105(m) utilities, which are described in subsection (2), under the penumbra of both sections. It is difficult to conceive how the legislature could have made this intention more clear.

Despite the legislature's obvious intent to make subsection (2) utilities and MPSC-recognized utilities both subject to the standards of subsection (1), Wolverine continues to argue that the 1989 amendments to subsection (2) indicate an intent to exempt it and all other 23 CFR 105(m) utilities from the consent requirements of subsection (1). Nothing in the language of the statute or its legislative history supports this view. The Court of Appeals correctly rejected it because it failed to give effect to every word and phrase in the statute. *Mayor of the City of Lansing v MPSC & Wolverine Pipe Line Co*, 257 Mich App 1, 14; 666 NW2d 298 (2003).

The addition of subsection (2) and all its amendments address standards that must be followed by companies seeking to use federally funded and MDOT-controlled rights-of-way. Since these are major highways, which depend greatly upon federal funding for construction and maintenance, the state wisely mandated that utilities using these rights-of-way conform to federal

government construction and financial requirements. The legislature did not want to jeopardize the funding it receives for these highways by allowing utilities to construct projects in them that would make the state ineligible for these federal funds. The legislature solved this problem by including a subsection that required utilities seeking to use these rights-of-way to meet federal standards. Incorporating the CFR definition of a utility was an essential part of this process.

The incorporation of the CFR definition of a public utility in this context and for this purpose makes perfect sense. Subsection (2) states separate and additional requirements that Wolverine and all 23 CFR 645.105(m) utilities must follow if the right-of-way they seek to use is one subject to federal regulation. Only those utilities defined in 23 CFR 645.105(m) who seek to use a limited access highway right-of-way are subject to MCL 247.183(2). This makes sense because only those utilities need to meet the federal standards. And only those utilities need to be concerned with federal highway funding dollars.

But nothing in subsection (2) is inconsistent with the statutory requirements of subsection (1). And the legislature chose a clear textual signal to make clear that those utilities were also encompassed within subsection (1). It used the word "including." And it then added a parenthetical qualifier, "subject to subsection (2)." Thus, all public utilities are subject to MCL 247.183(1).

Despite the clear and common sense interpretation adopted by the Court of Appeals, Wolverine continues to argue that a utility that meets the construction and financial standards required by subsection (2) does not have to comply with the consent requirement of subsection (1). Such an interpretation was properly rejected by the Court of Appeals because it would invalidate or render nugatory that part of subsection (1) which specifically includes the utilities.

The Court of Appeals correctly adhered to the rule presuming that every word in a statute has some meaning, and that courts are to avoid a construction that renders any part of a statute surplusage or nugatory. Thus the Court gave effect to the phrase "including, subject to subsection (2), longitudinally within limited access highway rights-of-way" by holding that "the Legislature subjected such projects to the requirements of both the first and second subsections of § 13." 257 Mich App at 14. In the Court's view, "[t]here is nothing in the language of the second subsection that would exclude a pipe line company from the requirements of the first subsection." 257 Mich App at 16-17. That ruling was correct and should be affirmed.

The Court of Appeals also correctly applied the rules of statutory construction to require that all of the words in the statute be given their ordinary meaning. Doing so, the Court considered the definition of the word "include," which can be found in *Random House Webster's College Dictionary* (1997) and means "to contain or encompass as part of a whole." 257 Mich App at 14. The Court reasoned that when this meaning is used to replace the word 'include' in the first sentence in MCL 247.183(1) it results in defining projects that are longitudinally within limited access highway right-of-way as falling within subsection (1). As so interpreted the sentence reads:

> public utility companies... may enter upon, construct, and maintain pipe lines or similar structures upon, over, across, or under any public road, bridge, street, or public place, encompassing as part of, subject to subsection (2), longitudinally within limited access highway rights-of-way, and across or under any of the waters in this state, with all necessary erections and fixtures for that purpose.

The meaning of the words is that subsection (1) incorporates, includes, and encompasses construction longitudinally within limited access highway rights-of-way but subjects it to the requirements of subsection (2).

The Court of Appeals also correctly used the rules of grammar to read the text. See *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000); *Carr v General Motors Corp*, 425 Mich 313, 317; 389 NW2d 686 (1986). The rules of grammar are presumed to have been known to the Legislature when it drafted the statute so that use of the word "including," in conjunction with the use of commas before and after the phrase "subject to subsection (2)," demonstrates the Legislature's intent to subject utilities and projects defined in subsection (2) to the consent requirement of subsection (1).

Although subsection (1) specifies some of the utilities to which it applies, it does not incorporate or reference utilities defined in 23 CFR § 105(m)[4] as does subsection (2). The fact that this definition is not referred to here cannot be interpreted to mean that such utilities are excluded from its mandate. All of the utilities referenced in subsection (2) are included in the public utilities definition of subsection (1), not only because subsection (1) says they are but also because the more general nature of the definition of public utilities used in subsection (1) includes them. The Court of Appeals correctly declined to read an exclusion into subsection (1) when no text supports such a reading.

Another problem with Wolverine's analysis of MCL 247.183 is that it would result in an interpretation that would render the statute unconstitutional. The Michigan Constitution explicitly empowered cities to exercise local control over the streets and highways within their

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[4]1 23 CFR 645.105(m) defines a "utility" as:

> ... a privately, publicly, or cooperatively owned line, facility or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public.

boundaries. In *Fenton Gravel Co v Fenton*, 371 Mich 358; 123 NW2d 763 (1963), the Court considered the relationship between a city ordinance, which restricted truck and trailer traffic on public roads, under the predecessor provision to Const 1963, art 7, § 29. In his concurring decision, which affirmed the city's right to control its public streets, Justice Black wrote that:

> My vote to affirm is cast according to foregoing convictions of supremacy of Constitution over statute. Any other rule would permit control by statute of the application of this constitutionally reserved local right. The Constitution grants no such power to the legislature. *Fenton*, *supra* at 368

Since Const 1963, art 7, § 29 must control over any interpretation of MCL 247.138, Wolverine's argument should be rejected because it would create a constitutional question. This Court should construe statutes to avoid constitutional questions whenever possible. See *Silver Creek Drain Dist v Extrusions Division, Inc*, 468 Mich 367; 663 NW2d 436 (2002). The interpretation offered by the City, unlike that of Wolverine, produces such a result. It was correctly embraced by the Court of Appeals.

Adoption of Wolverine's interpretation of the supremacy of subsection (2) would also result in a repeal by implication of the consent requirements mandated by subsection (1). Such repeals by implication are not to be indulged in if there is any other reasonable construction. *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 576; 548 NW2d 900 (1996). Michigan courts have held that the intent to repeal must appear very clear and they will not hold to a repeal if they can find any reasonable ground to hold the contrary. *Id.* The presumption is always against the intention to repeal where express terms are not used and the implication of repeal is not necessary. *House Speaker v State Administrative Bd*, 441 Mich 547, 562; 495 NW2d 539 (1993), quoting *Attorney General ex rel Owen v Joyce*, 233 Mich 619, 621; 207 NW 863 (1926).

In *Eyde Bros Development Co v Eaton County Drain Comm'r*, 427 Mich 271; 398 NW2d 297 (1986), the Court recognized that projects which are not constructed under the auspices of a specific public utility are still required to obtain local government consent under MCL 247.183(1):

> Section 13 authorizes public utilities and municipalities to construct and maintain public utilities. Because sewers are not constructed under the auspices of a specific public utility, such as is the case for telephone and electric lines, private entities may construct sewers under § 13 if the appropriate sections under the Drain Code have been followed. In this case, those steps would have been: 1) a release of right of way by majority vote resolution of Delta Township pursuant to § 74 and 2) authorization to construct the sewer from the Eaton County Drain Commissioner pursuant to § 433. [*Id.* at 293-294]

Both the statutory text, the historical background, the related statutes, and the constitutional overlay support the City of Lansing's position that local consent is required. The Court of Appeals correctly so held and its decision should be affirmed.

3. Application Of Administrative Rule 601 Required Wolverine To Demonstrate That It Had Local Consent With Its Application.

The Court of Appeals correctly held that MCL 247.183(1) requires local consent of the City of Lansing before Wolverine Pipe Line Company is entitled to enter upon, construct, or maintain pipe lines in the City. *Mayor of the City of Lansing v MPSC & Wolverine Pipe Line Co*, 257 Mich App 1; 666 NW2d 298 (2003). But it erroneously concluded that MPSC 460.17601(1)(c) does not require Wolverine to demonstrate that it obtained local consent before it filed its application.

The Court of Appeals incorrectly reasoned that the rule did not apply because local consent is not required under Act 16, MCL 438.8. The Court observed that the MPSC is a statutory creature "without authority to establish rules that violate statutory rules and regulations." *Mayor of the City of Lansing*, 257 Mich App at 8. The Court then reviewed only

MCL 483.1 et seq. to conclude that this statute does not explicitly reference local consent. The Court of Appeals then concluded that the MPSC properly refused to apply its rule to require Wolverine Pipe Line to demonstrate local consent as part of the application process.

The Court of Appeals limited the application of the MPSC rule to a single statute, the statute that empowered it to approve pipe line projects, without considering the statutory framework and constitutional overlay, all of which applies to the approval process and a proper interpretation of the MPSC rule. This ruling was erroneous and should be reversed.

R 460.17601(1)(c) of the MPSC's Rules of Practice and Procedure defines who must file an application for a certificate of public convenience with the MPSC to construct facilities for the transportation of crude oil or petroleum products. The rules apply to those, such as Wolverine Pipe Line, seeking approval for pipe line projects:

> A corporation, association, or person conducting oil pipe line operations within the meaning of the provisions of Act No. 16 of the Public Acts of 1929, being 483.1 et seq. of the Michigan Compiled Laws, that wants to construct facilities to transport crude oil or petroleum products as a common carrier for which approval is required by statute. [R 460.17601(1)(c).]

R 460.17601(2)(d), sets forth the application requirements with which Wolverine and other pipe line companies must comply:

> The application required in subrule (1) of this rule shall set forth, or by attached exhibits show, all of the following information:
>
> * * *
>
> (d) The municipality from which the appropriate franchise or consent has been obtained, if required, together with a copy of the franchise or consent.

The rule was promulgated pursuant to MCL 460.1 et seq., which is contained within Chapter 460 of the Michigan Compiled Laws and which governs the Michigan Public Service Commission.

The provisions of that chapter create the MPSC requirements, govern its powers and jurisdiction, and establish various other provisions relating to utilities and the MPSC. MCL 460.1 et seq.

The MPSC has promulgated extensive rules governing practice and procedure before it. See Mich Admin Code R 460.17101 et seq. (2001). Rule 103 provides that "[t]hese rules govern practice and procedure in all proceedings before the commission, except as otherwise provided by statute or these rules." Mich Admin Code R 460.17103(1). The rules govern the filing of petitions (such as that Wolverine filed in this case) and the manner of seeking leave to intervene (as the City of Lansing successfully did here). Mich Admin Code R 460.17201. In Rule 601, the MPSC provides for applications for new construction. Mich Admin Code R 460.17601. The rule specifically references applications when a natural gas pipe line company within the meaning of MCL 483.1 et seq "seeks to construct facilities to transport crude oil or petroleum...." Mich Admin Code R 460.17601(1)(b). It also specifically references applications when a corporation conducting pipe line operations within the meaning of Act No. 16 of the Public Acts of 1929, MCL 483.1 et seq, "wants to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products as a common carrier for which approval is required by statute." Mich Admin Code R 460.17601(1)(c). Thus, these general MPSC rules explicitly apply and govern proceedings to obtain approval for construction of facilities to transport crude oil or petroleum.

Chapter 483 deals with oil, gas, and brine lines. See MCL 483.1 et seq. The provisions of that chapter address pipe lines for transporting crude oil or petroleum and vest power in the MPSC, which is "authorized and empowered to make all rules, regulations, and orders, necessary to give effect to and enforce the provisions of this act." MCL 483.8. Nothing in this provision, which authorizes the MPSC to promulgate rules governing a pipe line company's request to

transport crude oil or petroleum products limits the rules or abrogates the normal requirement that a particular rule or statute be read within the context of related statutes or constitutional provisions that bear upon the same subject. See generally *Koontz v Ameritech Services, Inc*, 466 Mich 304; 645 NW2d 34 (2002) (harmonizing statutes and reading the meaning of words or phrases in them in context).

MCL 483.1 et seq. empowers the MPSC to control and regulate corporations involved in the purchase, transport, and storage of crude oil or petroleum. The act entitles such entities to acquire the necessary right-of-ways through condemnation by eminent domain and to use the highways of the state for "transporting petroleum by pipe lines." MCL 483.2. The act explicitly empowers the MPSC to control and regulate entities involved in this business. MCL 483.103. And it entitles the MPSC to investigate any alleged "neglect or violation of the laws of the state by any" entity engaged in this business. MCL 483.103. The "laws of the state" include both MCL 247.183 and Const 1963, art 7, § 29. A part of the MPSC's investigation of neglect or violation of the law should certainly involve ascertaining whether the public utility has obtained the necessary franchise or local consent to locate within a city. MCL 481.109 requires the MPSC to "determine that such line or lines will when constructed and in operation serve the convenience and necessities of the public before approval of such map and proposed transmission lines." MCL 483.109. This language too embodies an implicit notion that the MPSC will not allow applicants to proceed without appropriate local approval. Thus, the Court of Appeals erred when it concluded that the Rule did not apply because "MCL 483.1 et seq., does not require the prior consent of the affected local government." 257 Mich App at 8. The MPSC had statutory authority to require such a showing under MCL 483.103.

Not only was the MPSC empowered to require a showing of local consent, but its rules required it. The MPSC rules govern the mandate that the applicant include specified information in the application or in attached exhibits, including the applicant's name and address, the "city, village, or township affected," the nature of the utility service to be rendered, and evidence that local consent or a franchise has been obtained, "if required." Mich Admin Code R 460.17601(2). The meaning of "if required" as used in R 460.17601(2)(d), is the subject of disagreement between Wolverine and the City. The City contents that an applicant must submit proof of consent at the time it files its certificate application with the MPSC. This language in the rule supports the City's position. It states that the following information must be submitted with a certificate application:

> (d) The municipality from which the appropriate franchise or consent has been obtained, if required, together with a copy of the franchise or consent.

Nothing in the language limits "if required" to requirements set forth in MCL 483.1 alone. And such a reading is inconsistent with the words employed, which contain no such qualifier or limitation. The MPSC rule requires a showing of local consent or a franchise if it is required. The Court of Appeals correctly held that local consent is required. Thus, the rule obligated Wolverine to demonstrate that it had obtained such consent.

Instead, the MPSC erroneously ruled that "Because no law requires that Wolverine provide those consents or franchises with its application, Rule 601(2)(d) does not require that the Commission dismiss the case. (MPSC Order, p 11). The Court of Appeals affirmed this error when it held that R 460.17601(2)(d) did not require Wolverine to attach proof of the City's consent with its certificate of public convenience application. The "law" requiring submission of proof of local consent is the MPSC rule. Since the MPSC's power to grant a certificate of public

convenience is dependent on the filing of a complete application, and since its rules have the force and effect of law, an application which does not follow its own rules is defective and cannot be acted upon. *Danse Corp v Madison Heights*, 466 Mich 175; 644 NW2d 721 (2002); *Kirkby v MPSC*, 320 Mich 608; 32 NW2d 1 (1948). Agency rules of procedure are intended to lend stability, order and uniformity to proceedings in an administrative forum, and must avoid causing uncertainty for prospective litigants who otherwise are left without a method by which to advocate their rights. See generally *Detroit Base Coalition for Human Rights of Handicapped v Michigan Dep't of Social Services*, 431 Mich 172; 428 NW2d 335 (1988).

The MPSC rule at issue here required Wolverine to demonstrate that it had obtained local consent if such consent is required. When evaluating whether local consent is required, this Court should read the rule in context. *Sweatt v Dep't of Corrections*, 468 Mich 172; 661 NW2d 201 (2003). This approach stems from the doctrine of *nascitur a sociis*, which means "it is known from its associates." *Black's Law Dictionary* (6th ed), p 1060 quoted in *Sweatt*, 468 Mich at 179. This Court has repeatedly used that doctrine to ensure that words or phrases are given meaning by reading them in context. *Tyler v Livonia Public Schools*, 459 Mich 382, 390-391; 590 NW2d 560 (1999). Michigan courts have long held that statutes relating to the same subject are in pari materia and should be construed as a single system whenever such a construction is possible. *Rathbun v State*, 284 Mich 521; 28 NW 35 (1938); *In re Gallagher Ave in Hamtramck*, 300 Mich 309, 313; 1 NW2d 553 (1942); *Dearborn Twp Clerk v Jones*, 335 Mich 658; 57 NW2d 40 (1953). The statutes cited by the City are part of a single system governing the placement of utilities in highway rights-of-way. Therefore, they should be read together and applied at the most efficient and logical time.

The MPSC's enabling statute gives it the power to "hear and pass on all matters pertaining to, or incident to, the regulation of public utilities." It empowers the MPSC to consider and abide by all statutes "pertaining to, or incident to, the regulation of public utilities." The specific statute giving the MPSC regulatory authority over Wolverine here likewise requires the MPSC to investigate any alleged "neglect or violation of the laws of the state" by any entity engaged in the petroleum or crude oil pipeline business." MCL 483.103. And the rule likewise requires the MPSC to examine the application, a part of which must include proof of local consent. Mich Admin Code R 460.17601(2). Thus, the Court of Appeals erred in concluding that the MPSC could ignore this requirement.

Contrary to the Court of Appeals conclusion that only Act 16 requirements are included in the phrase "required by law" this Court has previously held that MCL 460.6 requires the MPSC to abide by and apply all laws of this state. In *Detroit Edison Co v Wixom*, 382 Mich 673, 682-683; 172 NW2d 382 (1969), the Court ruled that the MPSC is required to abide by validly enacted ordinances. Just as argued by the City of Lansing in this case, the Court pointed out that the statutory power of the MPSC, which allows it to regulate all public utilities, is qualified by the phrase "except as otherwise restricted by law." In this case the utility (Edison) did not consult the city of Wixom before it applied to the MPSC for approval of its project through four miles of public right-of-way through Wixom. The Court held that the MPSC "approval pertained only to the character of the construction and did not confer any rights to carry out construction until all necessary local franchises, permits, and authorizations were secured." *Id.* at 680. Citing CLS 1961, § 460.1 et seq., the Court explained that "[t]he commission represents all of the people in their capacity as users of electricity; the city represents some of the people in their multiple concerns as members of a local community. *Detroit Edison Co* at 682. In a concurring

opinion, Justice Black discussed in greater detail the MPSC's obligation to follow "all legal requirements" as stated in MCL 460.6:

> The language of the rule, annexed as it was to the commission's approval of Edison's plans and specifications for construction of this transmission line, is broad enough to exact compliance not only with constitutional and statutory requirements pertaining to local franchises and permits but also with "all legal requirements" of a local nature. The phrase "all legal requirements" certainly would include and require compliance with all validly applicable zoning regulations. [*Detroit Edison* at 693.]

The "legal requirement" that the Court examined there was a Wixom city ordinance. This Court read MCL 460.1 et seq. to require the MPSC to abide by "all validly applicable zoning regulations." That same reasoning applies here and compels the conclusion that Wolverine was obligated to demonstrate proof of local consent with its application to the MPSC. See also *Universal Am-Can, Ltd v Attorney General*, 197 Mich App 34; 494 NW2d 787 (1992) lv den 443 Mich 861; 505 NW2d 587 (1993) (recognizing MPSC jurisdiction to enforce state statutes as part of its regulatory authority).

The Court of Appeals assertion that Rule 460.601(1)(c) clearly "directs the reader to Act No. 16 of MCL 483.1 et seq., as the governing body of law" is inconsistent with this Court's decision in *Detroit Edison*. And equally importantly, it results in a crabbed reading of the MPSC rule that is inconsistent with its text and with its function within the overall fabric of the law. MCL 460.6 and Rule 460.17601(2)(d), when read together, make clear that Wolverine's application was required to show local consent. MCL 460.6 states:

> The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service

> commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, whether private, corporate, or cooperative; water, telegraph, oil, gas, and pipe line companies; motor carriers; and all public transportation and communication agencies other than railroads and railroad companies.

This broad language empowers the MPSC to "hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities." MCL 460.6. Rule 460.17601(2)(d) relies upon the enabling act, *supra*, and requires that the following information be submitted with certificate application.

> The municipality from which the appropriate franchise or consent has been obtained, if required, together with a copy of the franchise or consent.

Applying the plain meaning of the term "required by law," a phrase included in many opinions, rules, and statutes, leads to the conclusion reached by this Court in *Detroit Edison Co v Wixom*, 382 Mich 673, 682-683; 172 NW2d 382 (1969).

Rule 601 applies to all certificate of use applicants and all applicants are required to obtain and submit the appropriate franchise or consent with their application. Wolverine applied for a certificate of public convenience from the MPSC but failed to submit proof that it had obtained local consent with its application. The MPSC erred in approving its application without this showing. Its own rule clearly required such proof if local consent is required. As the Court of Appeals correctly held, local consent is required. Thus, the MPSC should have enforced its rule to deny the application absent such proof.

The decision of the Court of Appeals allowed the MPSC to ignore this rule and failed to give complete effect to Act 16, MCL 247.183(1), Const 1963, art 7, § 29, and MPSC rules. A harmonious interpretation of the rules, the statutory backdrop, and the constitutional overlay requires that a public utility submit proof of the consent required by MCL 247.183(1), and Const

1963, art 7, § 29 when it files for its certificate of public convenience. The City of Lansing therefore urges this Court to squarely hold that local consent is required here and that Wolverine is obligated to demonstrate local consent as part of its application to the MPSC. Its failure to do so requires a reversal of the MPSC order.

RELIEF

WHEREFORE, Defendants-Appellees and Cross-Appellants, the Mayor of the City of Lansing and the City of Lansing respectfully request that this Court affirm the Court of Appeals in part and reverse it in part, vacate the decision and order of the MPSC, and rule that Wolverine Pipe Line Company is obligated to obtain local consent before commencing construction, and is obligated to demonstrate that it has obtained the necessary local consent with its application for MPSC approval, that the failure to do so mandated a denial from the MPSC, and that the Mayor of the City of Lansing and the City of Lansing be provided all relief in law and equity to which they are entitled.

Respectfully submitted,

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DATED: October 20, 2003

STATE OF MICHIGAN

IN THE SUPREME COURT

MAYOR OF THE CITY OF LANSING,
CITY OF LANSING & INGHAM COUNTY
COMMISSIONER LISA DEDDEN,

Appellees/Cross-Appellants,

-vs-

MICHIGAN PUBLIC SERVICE COMMISSION
& WOLVERINE PIPE LINE COMPANY,

Appellants/Cross-Appellees.
_____/

Supreme Court No. 124136

Court of Appeals No. 243182

MPSC Case No. U-13225

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

CHRISTINE M. WARNEZ, being first duly sworn, deposes and says that on October 20, 2003, a copy of the Mayor of the City of Lansing & City of Lansing Appellees & Cross-Appellants' Brief on Appeal and Appendix, was served on ALBERT ERNST, Attorney for Wolverine, 124 W. Allegan, Lansing, MI 48933; PAUL O'KONSKI, Of Counsel for Wolverine, Law Department, P.O. Box 2220, Houston, TX 77252-2220; DAVID A. VOGES, Assistant Attorneys General, Public Service Division, 6545 Mercantile Way, Suite 15, Lansing, MI 48911; LISA DEDDEN, In pro per, Ingham County Commissioner, District 10, 1925 Bowker Drive, Lansing, MI 48911, by depositing same in the United States Mail with postage fully prepaid.

Christine M Warnez
CHRISTINE M. WARNEZ

Subscribed and sworn to before me
October 20, 2003.

Margie E. Bernard
[illegible] CO., MI
[illegible] Nov 29, 2006